

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

March 24, 1999

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) OCAHO Case No. 98B00051
)
AGRIPAC, INC.,)
Respondent.)
_____)

ORDER DENYING AGRIPAC'S MOTION TO STAY

I. PROCEDURAL HISTORY

This is an action arising under the Immigration and Nationality Act as amended, 8 U.S.C. §1324b (INA), in which the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) is the complainant and Agripac, Inc., is the respondent. OSC alleges that Agripac engaged in a pattern or practice of document abuse and a pattern or practice of citizenship status discrimination in its hiring policies and also committed unfair immigration-related employment practices against Agustin Lua Talavera when he applied for work at Agripac.¹ Agripac filed an answer denying the material allegations of the complaint and asserting four affirmative defenses. Discovery was undertaken and a hearing was scheduled to take place in July 1999. Agripac then filed a Motion to Stay Proceedings as of January 4, 1999, the date it claims to have filed for Chapter 11 bankruptcy protection in the U.S. District Court for the District of Oregon, Case No. 699-60001-frall, because all claims against Agripac were automatically stayed as of that date. OSC responded alleging that this proceeding is exempt from the stay.

¹ OSC has moved for leave to amend the complaint to add two additional counts of document abuse. At the joint request of the parties, Agripac has been given until March 27, 1999 to respond to this motion.

II. APPLICABLE STATUTES

In support of its motion, Agripac relies upon the automatic stay provision of the United States Bankruptcy Code, 11 U.S.C. §362(a)(1), which provides that the filing of a bankruptcy petition stays “the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the [bankruptcy case].” The stay is “applicable to all entities,” subject to the exceptions provided in subsection (b). 11 U.S.C. §362(a). The purpose of the automatic stay provision is to give the debtor a breathing spell by stopping collection efforts and to protect creditors by providing an orderly liquidation procedure which treats them equally. *Benedor Corp. v. Conejo Enters., Inc.*, 96 F.3d 346, 351–52 (9th Cir. 1996).

OSC’s response is that §362(a)(1) does not apply to this action because this is an action by a governmental unit enforcing its police or regulatory powers and therefore is exempted, citing 11 U.S.C. §362(b)(4). Subsection (b) exempts “the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit’s police or regulatory power” from the automatic stay provision. The purpose of the police or regulatory power exception is to prevent the bankruptcy court from becoming “‘a haven for wrongdoers.’” *Universal Life Church, Inc. v. United States*, 128 F.3d 1294, 1297 (9th Cir. 1997) (quoting 3 *Collier on Bankruptcy* §362.05[5][a], at 362-54 (15th ed. 1996)), *cert. denied*, ___ U.S. ___, 118 S.Ct. 2367 (1998). The phrase “police or regulatory power” in this context refers to actions to enforce laws affecting the public health, welfare, and safety, *Universal Life*, 128 F.3d at 1297, but not to actions solely to advance a pecuniary interest of the government in the debtor’s property. *Id.* at 1299.

III. DISCUSSION

No brief accompanied Agripac’s motion and no cases were cited for the proposition that a proceeding brought by OSC under 8 U.S.C. §1324b is subject to the automatic stay provision of the Bankruptcy Code. In order for the exception provided by 11 U.S.C. §362(b)(4) to apply to a particular proceeding, that action need involve only (1) a governmental unit; (2) acting to enforce its police or regulatory powers. *United States v. Garcia*, 7 OCAHO 950,

at 472 (1997).² OSC is part of a governmental unit because it is statutorily established as a component of the United States Department of Justice. 8 U.S.C. 1324b(c)(1). The only question then is whether an action brought by OSC pursuant to 8 U.S.C. §1324b is an action to enforce the agency's police or regulatory powers.

While the effect of the automatic stay provision on OSC-initiated actions in this forum does not appear to have been specifically addressed in OCAHO jurisprudence, many employer sanctions cases brought by the Immigration and Naturalization Service (INS) pursuant to 8 U.S.C. §1324a have been held to be within the statutory exemption for actions to enforce a governmental unit's police or regulatory powers. *E.g.*, *Garcia*, 7 OCAHO 950, at 472, *United States v. A&A Maintenance Enter., Inc.*, 6 OCAHO 852, at 271 (1996), *United States v. Broadcasters Unlimited, Inc.*, 4 OCAHO 719, at 1128 (1994), *United States v. United Pottery Mfg. & Accessories, Inc.*, 1 OCAHO 57, at 354 (1989) (Affirmation by the Chief Administrative Hearing Officer). No case holds otherwise. The Chief Administrative Hearing Officer noted in *United Pottery* that the automatic stay provision did not apply to a §1324a action because in such a case "INS is attempting to carry out Congress' intent of protecting our borders and in doing so the INS acts in the public's best interest." 1 OCAHO 57, at 354. OSC is similarly attempting here to fulfill the intent of Congress and to represent the public interest. *See United States v. McDonnell Douglas Corp.*, 3 OCAHO 507, at 1061 (1993).

The role of OSC in a proceeding pursuant to §1324b is analogous to the role of the EEOC in a Title VII case, "as a guardian of the public interest in discrimination cases," *id.*, and such enforcement actions brought by the EEOC have uniformly been held to fall within the exception of 11 U.S.C. §362(b)(4). *EEOC v. McLean Trucking Co.*, 834 F.2d 398, 402 (4th Cir. 1987), *EEOC v. Hall's Motor Transit Co.*, 789 F.2d 1011, 1014 (3d Cir. 1986), *EEOC v. Rath Packing Co.*, 787 F.2d 318, 325 (8th Cir.), *cert denied*,

² Citations to OCAHO precedents reprinted in bound Volumes 1 and 2, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States*, and Volumes 3 through 7, *Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Law of the United States*, reflect consecutive pagination within those bound volumes; pinpoint citations to those volumes are to the specific pages, seriatim, of the specific entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 7, however, are to pages within the original issuances.

479 U.S. 910 (1986). In finding that an action brought by EEOC was exempted under the police or regulatory powers exception, the court in *Rath Packing* emphasized that EEOC “seeks to stop a harm to the public—invidious employment discrimination—which is as detrimental to the welfare of the country as violations of environmental protection and consumer safety laws, which are expressly exempt from the automatic stay.” 787 F.2d at 325. OSC’s function in filing a §1324b case serves the same purpose as EEOC’s in filing a Title VII case: preventing employment discrimination, and, like a Title VII case, an action under §1324b constitutes an action to enforce an agency’s police or regulatory powers.

The Ninth Circuit, in which this case arises, has stated that “Congressionally established administrative agencies fall within the category of governmental unit” within the meaning of §362(b)(4), *NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 832 (9th Cir. 1991), and has held the exception to apply to a variety of actions by governmental agencies, such as revocation of tax exempt status by the IRS, *Universal Life*, 128 F.3d at 1297, state bar disciplinary proceedings, *Wade v. State Bar of Arizona*, 948 F.2d 1122, 1123-24 (9th Cir. 1991), and labor law enforcement, *NLRB v. Twin Cities Elec.*, 907 F.2d 108, 109 (9th Cir. 1990). Because OSC’s action against Agripac is also an action to enforce a governmental unit’s police or regulatory powers, the exception applies to it as well, and Agripac’s motion for a stay is therefore denied.

SO ORDERED.

Dated and entered this 24th day of March, 1999.

Ellen K. Thomas
Administrative Law Judge